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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8  
9 Phoenix Van Buren Partners, LLC, an  
Arizona limited liability company,

10 Plaintiff,

11 vs.

12 Moulding & Millwork, Inc., Pacific, a  
13 Washington corporation,

14 Defendant.

No. CV 11-01943-PHX-NVW

**ORDER**

15 Before the Court are Plaintiff's motion for summary judgment (Doc. 11) and  
16 Defendant's cross-motion for summary judgment (Doc. 17). Having reviewed the briefs,  
17 and having heard oral argument, Defendant's motion will be denied and Plaintiff's  
18 motion will be granted on Plaintiff's alter ego theory. In light of this disposition, the  
19 remainder of both Plaintiff's and Defendant's contentions need not be decided.

20 **I. LEGAL STANDARD**

21 Summary judgment is warranted if the evidence shows there is no genuine issue as  
22 to any material fact and the moving party is entitled to judgment as a matter of law. Fed.  
23 R. Civ. P. 56(a). The moving party bears the initial burden of identifying those portions  
24 of the pleadings, depositions, answers to interrogatories, and admissions on file, together  
25 with the affidavits, if any, which it believes demonstrate the absence of any genuine issue  
26 of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the  
27 nonmoving party would bear the burden of persuasion at trial, the moving party may  
28 carry its initial burden of production by submitting admissible "evidence negating an

1 essential element of the nonmoving party’s case,” or by showing, “after suitable  
2 discovery,” that the “nonmoving party does not have enough evidence of an essential  
3 element of its claim or defense to carry its ultimate burden of persuasion at trial.” *Nissan*  
4 *Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1105–06 (9th Cir. 2000).

5 When the moving party has carried its burden, the nonmoving party must respond  
6 with specific facts, supported by admissible evidence, showing a genuine issue for trial.  
7 *See* Fed. R. Civ. P. 56(c). But allegedly disputed facts must be material — the existence  
8 of only “*some* alleged factual dispute between the parties will not defeat an otherwise  
9 properly supported motion for summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477  
10 U.S. 242, 247–48 (1986) (emphasis in original).

11 Where the record, taken as a whole, could not lead a rational trier of fact to find  
12 for the nonmoving party, there is no genuine issue of material fact for trial. *Matsushita*  
13 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). However, the  
14 nonmoving party’s properly presented evidence is presumed to be true and all inferences  
15 from the evidence are drawn in the light most favorable to that party. *Eisenberg v. Ins.*  
16 *Co. of N. Am.*, 815 F.2d 1285, 1289 (9th Cir. 1987).

## 17 **II. BACKGROUND**

18 The following facts are undisputed unless attributed to one party or the other or  
19 otherwise specified.

### 20 **A. The Stock Purchase and Sale Agreement**

21 Plaintiff Phoenix Van Buren Partners owns a commercial property in Phoenix,  
22 Arizona. Beginning in 2006, Phoenix Van Buren leased that property to non-party Smith  
23 Moulding Wholesale (an Arizona corporation), for its moulding and custom door shop  
24 business.

25 In early 2008, Defendant Moulding & Millwork — which operated a business  
26 similar to that of Smith Moulding, save for the door shop — approached the owners of  
27 Smith Moulding, Jerome Smith and Blaine Jarvis, about buying out their interests. In  
28 February 2008, Moulding & Millwork reached an agreement with Smith and Jarvis

1 embodied in a “Stock Purchase and Sale Agreement.” (Doc. 12-1 at 34.) Smith  
2 Moulding itself was not a party to this agreement. The agreement set up a transaction  
3 through which Moulding & Millwork would pay off Smith Moulding’s creditors (who  
4 had security interests in all or substantially all of Smith Moulding’s assets) and also pay  
5 cash to Smith and Jarvis (who had personally guaranteed Smith Moulding’s liabilities)  
6 for their stock.<sup>1</sup>

7 The lease between Phoenix Van Buren and Smith Moulding prohibited “any  
8 change in the ownership of a controlling interest of the voting stock” of Smith Moulding  
9 without Phoenix Van Buren’s consent. (Doc. 12-1 at 23.) On February 22, 2008, a  
10 Smith Moulding officer obtained Phoenix Van Buren’s written consent to Moulding &  
11 Millwork’s proposed purchase “of all the issued and outstanding capital stock of Smith  
12 Moulding.” (Doc. 18-1 at 12.) Moulding & Millwork was not involved in obtaining this  
13 consent, nor did Moulding & Millwork guarantee the lease.

#### 14 **B. The Closing & Subsequent Events**

15 The transaction between Moulding & Millwork, Smith, and Jarvis closed on  
16 February 28, 2008. Moulding & Millwork’s parent company then wired approximately  
17 \$5.4 million directly to Smith Moulding’s creditors. Moulding & Millwork characterizes  
18 this as “caus[ing] Smith [Moulding] to pay . . . off [the liabilities]” (Doc. 17 at 4), but this  
19 is inaccurate. The payoff money went directly from Moulding & Millwork’s parent  
20 company’s account to Smith Moulding’s creditors’ accounts.<sup>2</sup> Smith and Jarvis then

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21  
22 <sup>1</sup> Moulding & Millwork asserts that Smith and Jarvis insisted on a buy-out  
23 structure that would minimize their taxable gains while at the same time paying off the  
24 Smith Moulding liabilities that Smith and Jarvis had personally guaranteed. According to  
25 Moulding & Millwork, Smith and Jarvis believed that a purchase price sufficient to  
26 compensate them for the value of their stock *and* to pay off outstanding liabilities would  
27 be taxed entirely as profit, so Smith and Jarvis therefore insisted on a stock purchase  
28 price exclusive of Smith Moulding’s liabilities, with such liabilities to be paid directly by  
Moulding & Millwork. Phoenix Van Buren disputes these assertions. This dispute is  
irrelevant given the disposition below.

<sup>2</sup> Moulding & Millwork later terminated the Uniform Commercial Code financing

1 received approximately \$2.1 million, and all of their stock in Smith Moulding was  
2 transferred to Moulding & Millwork.

3 On its accounting records, Moulding & Millwork booked the \$5.4 million creditor  
4 payoff as a loan from Moulding & Millwork to Smith Moulding. No documentation for  
5 such a loan is in the record. At oral argument, counsel for Moulding & Millwork stated  
6 that he was aware of no loan agreement between Smith Moulding and Moulding &  
7 Millwork. Moulding & Millwork, however, credited certain Smith Moulding assets  
8 (inventory, accounts receivable, equipment, and vehicles) against the loan in the amount  
9 of \$4.3 million, its view of their value, rather than their book value of \$4.7 million.

10 Shortly after closing, Moulding & Millwork closed Smith Moulding's bank  
11 accounts, replaced Smith Moulding's officers and directors with persons who were also  
12 Moulding & Millwork officers and directors, closed a separate Arizona warehouse from  
13 which Moulding & Millwork had been operating, and moved into the premises Smith  
14 Moulding was leasing from Phoenix Van Buren. Smith Moulding had no employees of  
15 its own after this point.

16 Around this time, Moulding & Millwork sent a letter to its customers under both  
17 its own and Smith Moulding's logos displayed side-by-side as follows:



22 (Doc. 12-3 at 15.) The letter announced itself to be from “Moulding & Millwork, Inc.,  
23 Pacific dba Smith Moulding Wholesale” and informed its recipients that “Smith  
24 Wholesale Moulding [sic] with Moulding & Millwork are pleased to announce the  
25

26  
27 statements of Smith Moulding's largest creditors, and it allowed other financing  
28 statements related to Smith Moulding's assets to expire.

1 partnering of the two companies. The Moulding and Millwork branch office and  
2 warehouse have been relocated to join the team at Smith Moulding.” (*Id.*)

3       Around the same time, Moulding & Millwork prepared a memorandum for its  
4 employees announcing, “With the Smith Wholesale Moulding name being so recognized  
5 in the local marketplace we will run our business under this name for the foreseeable  
6 future.” (Doc. 12-1 at 14.) Moulding & Millwork made this choice in part because it  
7 believed it would be easier to sell inventory and collect accounts receivable.

8       Upon moving into Smith Moulding’s facility, Moulding & Millwork added Smith  
9 Moulding’s inventory to its own and ceased to keep records for Smith Moulding  
10 generally, although Moulding & Millwork claims that it kept separate records for Smith  
11 Moulding’s door shop for a brief time. As Moulding & Millwork sold off inventory, it  
12 did not separately track whether that inventory had originally come from Smith  
13 Moulding, unless related to the door shop. Moulding & Millwork deposited the proceeds  
14 from these sales into its own general operating account. Moulding & Millwork cannot  
15 retrospectively account for the proceeds it received from Smith Moulding’s inventory,  
16 save for inventory items that Moulding & Millwork had not otherwise carried, and for  
17 sales made from the door shop for the time when it continued to keep separate records.

18       As with the inventory, the proceeds from Smith Moulding’s vehicles and  
19 equipment were deposited into Moulding & Millwork’s general operating account.

### 20       **C. The Door Shop’s Demise**

21       After the purchase, Moulding & Millwork learned that Smith Moulding’s door  
22 shop was not successful. In August 2008, Moulding & Millwork sent a letter to  
23 customers (with its own logo just above Smith Moulding’s logo) announcing that the  
24 door shop would be shut down. The letter was signed “Smith Moulding & Millwork.”  
25 (Doc. 12-3 at 62.) Moulding & Millwork then liquidated the door shop’s assets and  
26 claims to have applied the proceeds against its loan to Smith Moulding.

1           **D.     Smith Moulding's Goodwill and Going Concern Value**

2           As noted above, Moulding & Millwork used Smith Moulding's name (along with  
3 its own name) and represented to the public that it was doing business as Smith  
4 Moulding. Moulding & Millwork also used Smith Moulding's customer and supplier  
5 lists, and took its goodwill. Moulding & Millwork has presented no licensing agreement  
6 from Smith Moulding permitting such use (counsel at oral argument was not aware of  
7 any such agreement), and it never paid anything to Smith Moulding for use of these  
8 assets. It instead claims that these assets became nearly valueless due to the decline in  
9 the Phoenix-area home-building economy.

10           **E.     Moulding & Millwork's Abandonment of Phoenix Van Buren's**  
11           **Premises**

12           For about twenty months after acquiring Smith Moulding, Moulding & Millwork  
13 used the Phoenix Van Buren property and paid the periodic rents. Moulding & Millwork  
14 says that it made these payments on behalf of Smith Moulding. The record contains no  
15 sublease agreement between Smith Moulding and Moulding & Millwork, or agreement to  
16 assign the lease, and Moulding & Millwork's counsel at oral argument again stated that  
17 he was aware of no such agreements. (Cf. Doc. 12-1 at 23 (lease provision permitting  
18 Smith Moulding to sublet, or assign the lease, to a parent company without Phoenix Van  
19 Buren's permission, but requiring the parent company to "assume in writing all of  
20 Tenant's obligations under this Lease").) Moulding & Millwork eventually decided the  
21 Phoenix Van Buren property was not profitable. It removed all assets and equipment,  
22 abandoned the property, and made no further rent payments to Phoenix Van Buren.

23           **F.     Phoenix Van Buren's Lawsuits**

24           After Moulding & Millwork vacated Phoenix Van Buren's premises and stopped  
25 paying rent, Phoenix Van Buren sued Smith Moulding in Maricopa County Superior  
26 Court for breach of the lease. Geoffrey Hamilton, general manager of special projects at  
27 both Moulding & Millwork and Smith Moulding, was Smith Moulding's designated  
28

1 corporate representative, testifying on Smith Moulding's behalf at the trial. Moulding &  
2 Millwork's current counsel represented Smith Moulding in that action.

3 On July 27, 2011, Phoenix Van Buren obtained a judgment against Smith  
4 Moulding for \$4,276,246.45 (comprising damages of \$4,203,546.00, attorney's fees of  
5 \$71,636.50, and taxable costs of \$1,063.95), plus judgment interest at ten percent per  
6 annum. At a judgment debtor's exam, Hamilton once again testified on Smith  
7 Moulding's behalf, represented by Moulding & Millwork's current counsel. Because  
8 Smith Moulding no longer had any assets, Phoenix Van Buren then filed the current  
9 action against Moulding & Millwork to enforce the judgment on theories of fraudulent  
10 transfer, alter ego, successor liability, and the trust fund doctrine. Phoenix Van Buren has  
11 now moved for summary judgment to establish its causes of action, and Moulding &  
12 Millwork has cross-moved to defeat them.

### 13 **III. VEIL-PIERCING THROUGH AN ALTER EGO THEORY**

#### 14 **A. Alter Ego Standard and Application**

15 "[A]lter-ego status is said to exist when there is such unity of interest and  
16 ownership that the separate personalities of the corporation and owners cease to exist."  
17 *Dietel v. Day*, 16 Ariz. App. 206, 208, 492 P.2d 455, 457 (1972). If the corporation has  
18 become the shareholders' alter ego and honoring the separateness between the  
19 shareholders and corporation would sanction a fraud or promote injustice, courts will  
20 pierce the corporate veil and hold the shareholders responsible for the corporation's  
21 liabilities. *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 37–38, 821 P.2d 725,  
22 728–29 (1991).

23 In Arizona, alter ego claims comprise two elements: (1) the parent company's  
24 substantially total control of the subsidiary, and (2) that honoring the separateness  
25 between the parent and subsidiary would sanction a fraud or promote injustice. *Id.* at 37–  
26 38, 821 P.2d at 728–29. These elements will be addressed in order, but with an equitable  
27 subrogation interlude occasioned by Moulding & Millwork's argument in that regard.  
28



1                   **1.     Substantially Total Control**

2           Moulding & Millwork exercised substantially total control over Smith Moulding.  
3   All of Smith Moulding's officers and directors were Moulding & Millwork employees.  
4   Moulding & Millwork closed Smith Moulding's bank accounts and transferred its funds  
5   into Moulding & Millwork's own accounts. Inventory was intermingled as well, to  
6   Moulding & Millwork's sole benefit. Moulding & Millwork appropriated Smith  
7   Moulding's goodwill and took to itself the going concern value of Smith Moulding with  
8   no pretense of compensation. Moulding & Millwork stripped Smith Moulding of  
9   everything to meet the obligations of the business Moulding & Millwork conducted in  
10   Smith Moulding's name for Moulding & Millwork's benefit. Moulding & Millwork paid  
11   the rent to Phoenix Van Buren as long as it benefited Moulding & Millwork, and paid all  
12   of Smith Moulding's other expenses.

13           Further, none of the foregoing was documented. On its own accounting records,  
14   Moulding & Millwork booked its \$5.4 million creditor payoff as an intercompany loan,  
15   but there is no known loan agreement between the two companies. Moulding &  
16   Millwork moved into the space leased by Smith Moulding, but there is no known  
17   sublease agreement or written assumption of the lease (as the lease itself required).  
18   Moulding & Millwork used Smith Moulding's good will — by using its name and  
19   letterhead — but there is no known licensing agreement permitting such use.<sup>3</sup> It kept no

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<sup>3</sup> Moulding & Millwork claims that Smith Moulding's goodwill had no value.  
21   Moulding & Millwork has cited no authority for the proposition that corporate formalities  
22   may be disregarded with respect to property that has no value. But in any event,  
23   Moulding & Millwork contradicts its own assertion when it says that it continued to use  
24   Smith Moulding's name because doing otherwise could harm efforts to collect accounts  
25   receivable and sell assets at a fair price. If true, the Smith Moulding name certainly had  
26   value. Going concern value is, by definition, the value of the business over and above its  
27   liquidation value. *See* Black's Law Dictionary 1587 (8th ed. 2004).

28           In this same regard, Moulding & Millwork purchased Smith Moulding for \$2.1  
million more than its outstanding debts, and it asserts that those outstanding debts were  
undersecured by Smith Moulding's assets. This again suggests that Smith Moulding had  
value above its liquidation value, even if that value declined due to the collapse of the



1 separate books or records for Smith Moulding, save for a limited time with respect to the  
2 door shop. In sum, it operated Smith Moulding in name only, otherwise absorbing all of  
3 Smith Moulding into itself without regard for its separate existence.

4 This set of facts easily satisfies the substantially total control test. As noted in  
5 *Gatecliff*,

6 Substantially total control may be proved by showing, among  
7 other things: stock ownership by the parent; common officers  
8 or directors; financing of subsidiary by the parent; payment of  
9 salaries and other expenses of subsidiary by the parent; failure  
10 of subsidiary to maintain formalities of separate corporate  
existence; similarity of logo; and plaintiff's lack of  
knowledge of subsidiary's separate corporate existence.

11 *Gatecliff*, 170 Ariz. at 37, 821 P.2d at 728. All of these factors have been established  
12 beyond genuine dispute, save for the last two — but five of seven was good enough in  
13 *Gatecliff*, *see id.*, as it is here.

14 Moulding & Millwork challenges to these factors are without merit. Regarding  
15 “financing of subsidiary by the parent” and “payment of salaries and other expenses of  
16 subsidiary by the parent,” Moulding & Millwork claims that Phoenix Van Buren “alleges  
17 the exact opposite . . . , not that [Moulding & Millwork] financed and paid salaries and  
18 expenses of Smith [Moulding], but that money and assets flowed the other way, from  
19 Smith [Moulding] to [Moulding & Millwork] for no consideration.” (Doc. 17 at 8.) This  
20 argument makes little sense on its own terms, and on the facts of the case. Phoenix Van  
21 Buren indeed believes that “money and assets flowed the other way” — all of Smith  
22 Moulding's money and assets, leaving it with nothing. Only Moulding & Millwork could  
23 cover Smith Moulding's ongoing expenses.

24 Concerning the same factors, Moulding & Millwork argues that “loans to Smith  
25 [Moulding] after the transaction . . . do[] not make the two companies alter egos of one  
26 another.” (*Id.*) But the record discloses no loans to Smith Moulding after the transaction.

27 \_\_\_\_\_  
28 Phoenix-area construction industry.

1 The record discloses only one arguable loan, *i.e.*, the \$5.4 million creditor payoff, booked  
2 by Moulding & Millwork after closing as a loan to Smith Moulding. To the extent  
3 Moulding & Millwork now implies that its payment of Smith Moulding's ongoing  
4 expenses amounted to additional loans, that argument is forfeited. In any event, a  
5 properly developed record of such loans would not avoid the third factor. Such loans  
6 would have been necessary because Smith Moulding had no money of its own to meet  
7 "normal obligations foreseeable [*sic*] in a business of its size and character." *Wash. Nat'l*  
8 *Corp. v. Thomas*, 117 Ariz. 95, 101, 570 P.2d 1268, 1274 (Ct. App. 1977) (internal  
9 quotation marks omitted), *disapproved on others grounds in Greenfield v. Cheek*, 122  
10 Ariz. 57, 593 P.2d 280 (1979). In other words, under these circumstances, loans to Smith  
11 Moulding after the February 2008 transaction would likely establish rather than refute the  
12 third factor.

13 Finally, as to the "formalities of separate corporate existence," Moulding &  
14 Millwork has only one response: "Smith [Moulding] is an Arizona corporation —  
15 [Moulding & Millwork] is a Washington corporation." (Doc. 17 at 8.) The irrelevance  
16 of this assertion is apparent on its face. Accordingly, considering all of the factors,  
17 Moulding & Millwork exercised "substantially total control" over Smith Moulding.

## 18 **2. Equitable Subrogation**

### 19 **a. Summary of Argument**

20 Moulding & Millwork does not dispute that it mingled Smith Moulding's  
21 inventory with its own indiscriminately, and likewise mingled the funds obtained from  
22 that inventory with its own. It does not dispute using Smith Moulding's name and paying  
23 all of Smith Moulding's expenses. It also does not dispute that Smith Moulding  
24 neglected most — perhaps all — corporate formalities while under Moulding &  
25 Millwork's control.

26 Moulding & Millwork's only real counterargument is that it was entitled to do as it  
27 pleased with Smith Moulding's assets under the doctrine of equitable subrogation.  
28 "Subrogation is the substitution of another person in the place of a creditor, so that the

1 person in whose favor it is exercised succeeds to the rights of the creditor in relation to  
2 the debt.” *Mosher v. Conway*, 45 Ariz. 463, 468, 46 P.2d 110, 112 (1935). Moulding &  
3 Millwork argues that its \$5.4 million creditor payoff loan subrogated it to the rights of  
4 Smith Moulding’s secured creditors (who had security interests in all or nearly all of  
5 Smith Moulding’s assets), thus entitling Moulding & Millwork to treat Smith Moulding’s  
6 assets as collateral for the loan and to satisfy the loan through the value realized from the  
7 collateral.

8 **b. Lack of Analogous Authority**

9 The Court has located no equitable subrogation case similar to the situation  
10 presented in this action. Equitable subrogation typically involves a claim to property that  
11 still exists. *See, e.g., Mosher, supra; Sun Valley Fin. Servs. of Phoenix, L.L.C. v.*  
12 *Guzman*, 212 Ariz. 495, 134 P.3d 400 (Ct. App. 2006); *Lamb Excavation, Inc. v. Chase*  
13 *Manhattan Mortg. Corp.*, 208 Ariz. 478, 95 P.3d 542 (Ct. App. 2004); *Del E. Webb Hotel*  
14 *Co. v. Bentley*, 8 Ariz. App. 408, 446 P.2d 687 (1968). The property over which  
15 Moulding & Millwork claims an equitably subrogated interest no longer exists.  
16 Moulding & Millwork liquidated it and seeks to justify such liquidation after the fact. In  
17 other words, Moulding & Millwork treats equitable subrogation as a matter of right once  
18 one has paid another’s debt. However, equitable subrogation “is not a matter of absolute  
19 right but rather, a matter of grace to be granted or withheld as the equities of the case may  
20 demand.” *Del E. Webb*, 8 Ariz. App. at 411, 446 P.2d at 690 (internal quotation marks  
21 removed; alterations incorporated). “Whether it is applicable or not depends upon the  
22 *particular facts and circumstances of each case as it arises.*” *Mosher*, 45 Ariz. at 468, 46  
23 P.2d at 112 (emphasis added).

24 Moulding & Millwork leans heavily on a recent Arizona Court of Appeals case,  
25 *Sourcecorp, Inc. v. Norcutt*, \_\_\_ Ariz. \_\_\_, 258 P.3d 281 (Ct. App. 2011). In *Sourcecorp*,  
26 the Norcutts paid cash to buy a home from a third party, the Shill family, and in the  
27 process paid off the Shills’ debt on that home. Unfortunately, the Norcutts’ title company  
28 overlooked Sourcecorp’s judgment lien on the home. Sourcecorp soon initiated sheriff’s

1 sale proceedings and the Norcutts moved to quash the execution writ on various theories.  
2 One such theory was equitable subrogation — *i.e.*, that when the Norcutts paid off the  
3 Shills’ debt, they succeeded to the Shills’ creditor’s first-position lien, ahead of  
4 Sourcecorp’s judgment lien.

5 The trial court rejected this argument because it would mean that the Norcutts  
6 would “hold a lien on their own house.” *Id.* ¶ 9, 258 P.3d at 283 (quoting trial court’s  
7 order). The Court of Appeals, however, accepted the argument, reasoning that under the  
8 circumstances there was no reason that an equitable doctrine like equitable subrogation  
9 should not allow the Norcutts to step into the shoes of the Shills’ prior creditor. *Id.*  
10 ¶¶ 33–36, 258 P.3d at 288–89. The Court of Appeals was substantially influenced by the  
11 unique and irreplaceable nature of real estate. *Id.* ¶ 35, 258 P.3d at 289 (reasoning that  
12 the Norcutts’ obvious remedy in damages against their title company could not make up  
13 for losing the home they wanted).

14 On the morning of oral argument in this action, the Arizona Supreme Court  
15 affirmed *Sourcecorp*, but on slightly different grounds. *Sourcecorp, Inc. v Norcutt*, \_\_\_\_  
16 Ariz. \_\_\_\_, \_\_\_\_ P.2d \_\_\_\_, 2012 WL 1138251 (Ariz. Apr. 6, 2012), *slip opinion available*  
17 *at* <http://www.azcourts.gov/Portals/23/pdf2012/CV110269PR.pdf>. Rather than focusing  
18 on the unique nature of real estate, the Supreme Court noted that refusing equitable  
19 subrogation would result in a windfall to Sourcecorp because it only moved into first  
20 position through a mistake (*i.e.*, assuming that the Norcutts never would have bought the  
21 home and paid off the first position lien but for the title company’s failure to find the  
22 judgment lien). *Id.* ¶¶ 23–24. However, addressing the unfair possibilities inherent in  
23 giving an owner a lien on his or her own property, the Supreme Court affirmed that  
24 “equitable subrogation depends on the facts of the particular case” and held that, as to the  
25 Norcutts, it was “not appropriate to confer on [them] a right to ‘foreclose’ on the interest  
26 to which they are subrogated.” *Id.* ¶ 29. Thus, the Norcutts had first position to the  
27 extent they could prevent Sourcecorp from foreclosing, but they could not themselves  
28 foreclose.

1 Although a narrow expansion of equitable subrogation, *Sourcecorp* is nonetheless  
2 similar to other equitable subrogation cases to the extent it resolves claims to still-  
3 existing property. That is not this case.

4 Moulding & Millwork nonetheless believes that *Sourcecorp* justifies its course of  
5 action here, analogizing itself to the Norcutts, who ended up owning both the property  
6 and a lien on that property. But even on that account, Moulding & Millwork misses a  
7 crucial distinction: Moulding & Millwork did not own the property. Moulding &  
8 Millwork bought Smith Moulding's stock, not its assets. "It is elementary that a  
9 corporation is for most purposes an entity distinct from its individual members or  
10 stockholders. By the very nature of a corporation the corporate property is vested in the  
11 corporation itself and not in the stockholders." *Corp. Comm'n v. Consolidated Stage Co.*,  
12 63 Ariz. 257, 259, 161 P.2d 110, 111 (1945); *see also* 1 William Meade Fletcher,  
13 *Fletcher Cyclopedia of the Law of Private Corporations* § 31 (perm. ed.) ("The property  
14 of the corporation is its property and not that of the shareholders as owners, even if there  
15 is only one shareholder . . . ." (footnote omitted)) ("*Fletcher Cyclopedia*"). Further, as  
16 the Arizona Supreme Court demonstrated in affirming *Sourcecorp*, even if Moulding &  
17 Millwork had managed to obtain both possession of and a lien on those assets, it would  
18 not be automatically entitled to foreclose. It would instead depend on the facts of the  
19 particular case. Accordingly, the Court could find no case discussing (much less  
20 permitting) equitable subrogation in circumstances similar to those here.

21 **c. Lack of Equitable Justification for Subrogation**

22 Even if Moulding & Millwork could theoretically qualify for equitable  
23 subrogation, equity would not authorize it on the facts of this particular case. First,  
24 Moulding & Millwork has already disposed of the property at issue, thus leaving the  
25 Court with no interests to adjust other than who pays whom. Second, Moulding &  
26 Millwork disposed of the property without telling Phoenix Van Buren that it was  
27 emptying Smith Moulding of all ability to operate as a going concern on its own. Third,  
28 Moulding & Millwork took the benefits of the lease for as long as was convenient and

1 then abandoned the property, thus displaying unclean hands. In these circumstances,  
2 equitable subrogation is not justified.

3 **d. Additional Failure to Respect Corporate Separateness**

4 Moulding & Millwork's claim of equitable subrogation to the position of Smith  
5 Moulding's secured creditors fails as a matter of law. But even if equitable subrogation  
6 applied from the closing of the February 2008 transaction, Moulding & Millwork's  
7 undisputed conduct thereafter further proves Phoenix Van Buren's claims for piercing  
8 Smith Moulding's corporate veil to reach Moulding & Millwork.

9 Moulding & Millwork says that it "received certain Smith [Moulding] assets or  
10 proceeds from the disposition of [such] assets" as in-kind partial satisfaction of the \$5.4  
11 million loan that supposedly subrogated it to the secured creditors' rights. (Doc. 17 at 4.)  
12 If true, such in-kind satisfaction could only have happened in one of two ways. First,  
13 Moulding & Millwork could have foreclosed on prior creditors' security interests, bid in  
14 the debt, and seized the assets. Moulding & Millwork makes no argument that it pursued  
15 this approach. In fact, it did the opposite: it terminated the relevant financing statements  
16 or allowed them to expire. At that point, the property subject to the financing statements  
17 was unquestionably Smith Moulding's, free and clear — not Moulding & Millwork's.

18 The second method through which Moulding & Millwork could have obtained in-  
19 kind satisfaction would have been for Smith Moulding to agree to transfer its assets as  
20 payment on the debt. Moulding & Millwork's briefs invite the reader to assume that  
21 Smith Moulding took this course of action, but Moulding & Millwork does not actually  
22 say that Smith Moulding made this choice, it submits no evidence showing that such a  
23 choice was made, and counsel at oral argument knew of none. For instance, Moulding &  
24 Millwork fails to provide documentation of the procedures Smith Moulding would be  
25 required to follow if it had agreed to surrender all of its assets to Moulding & Millwork.  
26 An Arizona corporation may not "dispose of all or substantially all of its property . . .  
27 other than in the usual and regular course of business" without a proposal from the board  
28 of directors and shareholder approval. A.R.S. § 10-1202(A)–(B). Moulding & Millwork

1 has submitted no evidence suggesting that Smith Moulding observed this requirement.  
2 And even if it did not apply, prudence would demand some sort of documentation —  
3 from both Smith Moulding and Moulding & Millwork — memorializing an agreement to  
4 exchange \$4 million in assets (supposedly all of Smith Moulding’s assets) for credit  
5 against a debt. Moulding & Millwork has submitted no such documentation.

6 Moulding & Millwork simply seized Smith Moulding’s assets, which would not  
7 be permissible for any secured creditor. Thus, even if equitably subrogated to Smith  
8 Moulding’s prior creditors’ security interests, Moulding & Millwork’s failure to behave  
9 like a secured creditor further evinces the lack of respect for the separateness between  
10 itself and its subsidiary.

### 11 **3. Sanctioning a Fraud or Promoting Injustice**

12 Phoenix Van Buren has established a lack of genuine dispute regarding the  
13 “substantially total control” element of the veil-piercing analysis. To prevail fully at this  
14 summary judgment stage, Phoenix Van Buren must also establish that honoring the  
15 separateness between the parent and subsidiary would sanction a fraud or promote  
16 injustice. *Gatecliff*, 170 Ariz. at 37–38, 821 P.2d at 728–29. The analysis here is similar  
17 to the equitable reasons for denying subrogation. Specifically, refusing to pierce the  
18 corporate veil in this case would promote injustice by permitting Moulding & Millwork  
19 to take the benefits of the lease (premises from which to do business, along with whatever  
20 advantages it may have gained from doing business in that specific location) without its  
21 corresponding burdens (the remedies provided to Phoenix Van Buren against a tenant  
22 who abandons the lease). Moreover, when Phoenix Van Buren consented to Moulding &  
23 Millwork’s takeover, it was not informed that the transfer “of all the issued and  
24 outstanding capital stock of Smith Moulding” (Doc. 18-1 at 12) would also involve an  
25 intercompany loan to be satisfied in-kind through all Smith Moulding assets, leaving it  
26 with nothing. Had Phoenix Van Buren known how Moulding & Millwork planned to  
27 operate Smith Moulding, it very likely would not have consented to the change in control.  
28



1 Moulding & Millwork cannot, in such circumstances, keep the limited liability benefit of  
2 the corporate form.

3 In opposition, however, Moulding & Millwork claims:

4 [Phoenix Van Buren] is in no worse position now than it  
5 would have been if [Moulding & Millwork] had not appeared  
6 on the scene. In fact, [Phoenix Van Buren] is better off as a  
7 result of the transaction. As of the closing, Smith [Moulding]  
8 owed [Phoenix Van Buren] \$33,635.03 in past due rent,  
9 which was paid with [Moulding & Millwork]'s funds. After  
10 the closing, [Moulding & Millwork] funded additional rent  
11 payments on behalf of Smith [Moulding] totaling \$1,053,360.  
12 If the transaction had not occurred, Smith [Moulding] would  
have defaulted on the lease long before it eventually did.  
[Phoenix Van Buren] would not have had any claim against  
the prior owners, as shareholders, or against the encumbered  
assets of Smith [Moulding] pledged to secured creditors.

13 (Doc. 17 at 16 (citations omitted).) Even if relevant, the argument is misdirected because  
14 it focuses entirely on the immediate effect of February 2008 takeover, rather than  
15 abandonment of the lease months later. One can assume that Moulding & Millwork's  
16 takeover of Smith Moulding benefited Phoenix Van Buren for the months in which  
17 Moulding & Millwork continued to pay the rent. But the fact remains that Moulding &  
18 Millwork eventually stopped paying the rent, after having emptied Smith Moulding of all  
19 ability to do so on its own. Benefitting from corporate separateness at that point, after  
20 having disregarded it since the takeover, would be unjust.

21 In addition, there is no evidence in the record that "Smith [Moulding] would have  
22 defaulted on the lease long before it eventually did." It is only speculation. If Smith  
23 Moulding was indeed going under before Moulding & Millwork arrived, it may have  
24 defaulted, or it may have renegotiated the lease, or it may have found a sublessor, or any  
25 number of other possibilities. But no evidence purports to establish that Smith Moulding  
26 would have failed absent Moulding & Millwork's intervention. Nor has Moulding  
27 & Millwork cited any authority establishing the relevance of this consideration. As  
28

1 noted, saving Smith Moulding from collapsing in February 2008 does not excuse  
2 Moulding & Millwork's subsequent conduct.

3 Finally, it is also no defense that Moulding & Millwork may have been able to put  
4 Phoenix Van Buren in the same position lawfully (*e.g.*, by observing the necessary  
5 formalities to document the \$5.4 million loan, causing Smith Moulding's board to resolve  
6 to transfer all of its assets to Moulding & Millwork in satisfaction of that loan, and so  
7 forth). In every veil-piercing case, the plaintiff would be left without a meaningful  
8 remedy had the shareholder respected the separateness of the corporate form.

9 Phoenix Van Buren has established that observing the corporate form would  
10 sanction a fraud or promote injustice. Accordingly, Phoenix Van Buren has satisfied  
11 both elements of the alter ego test. *See Gatecliff*, 170 Ariz. at 37–38, 821 P.2d at 728–29.

12 **B. Whether Fact Issues Remain**

13 Moulding & Millwork argues that, even if liable on an alter ego theory, fact issues  
14 remain that preclude summary judgment. Specifically: “If [Phoenix Van Buren] had a  
15 breach of lease claim against [Moulding & Millwork], it should have asserted it. If that is  
16 the case, then [Moulding & Millwork] should be afforded the opportunity to present all  
17 defenses to that claim, including but not limited to the duty to mitigate damages, not  
18 simply accept a number derived in a separate litigation against Smith [Moulding].” (Doc.  
19 17 at 16–17.)

20 Moulding & Millwork mischaracterizes the issue. Establishing lack of corporate  
21 separateness is a different inquiry than breach of the lease. Successfully holding a  
22 shareholder liable for the corporation's acts does not give the shareholder the right to  
23 relitigate the underlying case against the corporation. *Cf.* 1 *Fletcher Cyclopedica* § 41.10  
24 (“A finding of fact of alter ego . . . furnishes a means for a complainant to reach a second  
25 corporation or individual upon a cause of action that otherwise would have existed only  
26 against the first corporation. An attempt to pierce the corporate veil is a means of  
27 imposing liability on an underlying cause of action such as a tort or breach of contract.”  
28 (footnotes omitted)).

1 In any event, a claim preclusion or issue preclusion analysis would lead to the  
 2 same result. This Court must give the Superior Court judgment “the same full faith and  
 3 credit . . . as [it has] by Law or usage in the courts of [Arizona].” 28 U.S.C. § 1738.  
 4 Arizona follows the *Restatement (Second) of Judgments* § 39 on this issue. *See Indus.*  
 5 *Park Corp. v. U.S.I.F. Palo Verde Corp.*, 26 Ariz. App. 204, 209, 547 P.2d 56, 61 (1976)  
 6 (citing with approval *Restatement (Second) of Judgments* § 83 (Tent. Draft No. 2, 1975),  
 7 which was eventually codified at § 39). According to the *Restatement*, “A person who is  
 8 not a party to an action but who controls or substantially participates in the control of the  
 9 presentation on behalf of a party is bound by the determination of issues decided as  
 10 though he were a party.” *Restatement (Second) of Judgments* § 39 (1982).

11 To have control of litigation requires that a person have  
 12 effective choice as to the legal theories and proofs to be  
 13 advanced in behalf of the party to the action. . . . Whether his  
 14 involvement in the action is extensive enough to constitute  
 15 control is a question of fact, to be resolved with reference to  
 16 these criteria. It is sufficient that the choices were in the  
 17 hands of counsel responsible to the controlling person;  
 18 moreover, the requisite opportunity may exist even when it is  
 19 shared with other persons. It is not sufficient, however, that  
 20 the person merely contributed funds or advice in support of  
 21 the party, supplied counsel to the party, or appeared as *amicus*  
 22 *curiae*.

23 *Id.* cmt. c.

24 The evidence already considered suffices to answer this question. As a matter of  
 25 common sense, a shareholder that disregards corporate separateness is *per se* in control of  
 26 the corporation and its litigation and therefore bound as though a party. Even if this were  
 27 not the case, it is beyond dispute here that Moulding & Millwork in fact controlled Smith  
 28 Moulding’s litigation. Smith Moulding could do nothing except as animated by  
 Moulding & Millwork because Smith Moulding had no employees of its own, or money.  
 Geoffrey Hamilton took the title of general manager of special projects at Smith  
 Moulding — the same title he held at Moulding & Millwork — and acted as Smith

1 Moulding's representative in the Superior Court action, with Moulding & Millwork's  
2 current counsel representing Smith Moulding. If Smith Moulding did not, at that time,  
3 present defenses such as mitigation, Moulding & Millwork can blame only itself.

4 Phoenix Van Buren's motion for summary judgment will be granted, and  
5 Moulding & Millwork's cross-motion denied, on Phoenix Van Buren's alter ego cause of  
6 action.

#### 7 **IV. REMAINING ISSUES**

8 Phoenix Van Buren's success on its alter ego claim makes consideration of its  
9 other theories unnecessary. None of those other theories could afford more relief than  
10 piercing the corporate veil. Thus, the Court does not address whether either side has  
11 proved or disproved Phoenix Van Buren's fraudulent transfer, successor liability, and  
12 trust fund theories.

#### 13 **V. FORM OF JUDGMENT**

14 Having operated Smith Moulding as an alter ego, the judgment against Moulding  
15 & Millwork should be the same as the judgment Phoenix Van Buren obtained in the  
16 Superior Court. *See 1 Fletcher Cyclopedica* § 41.10. However, the issue of post-  
17 judgment interest requires some discussion. Before July 20, 2011, the Arizona statutory  
18 judgment rate was ten percent per annum. A.R.S. § 44-1201(A) (2003 & Supp. 2010).  
19 Since that date, the judgment rate is prime-plus-one-percent. 2011 Ariz. Sess. Laws., ch.  
20 99 § 15. Phoenix Van Buren obtained its judgment on July 27, 2011. It therefore should  
21 have received prime-plus-one-percent on the principal judgment. It instead received ten  
22 percent.

23 At oral argument, counsel for Phoenix Van Buren clarified that he had submitted a  
24 form of judgment before the interest rate change took effect, but the Superior Court did  
25 not act on it until after the change. When the Superior Court did act, it approved the form  
26 of judgment without modification.

27 At oral argument, counsel for both sides agreed, under the authority of *McBride v.*  
28 *Superior Court*, 130 Ariz. 193, 635 P.2d 178 (1981), that the new interest rate controls


1 regardless of the mistake. Counsel for Phoenix Van Buren represented that the  
2 appropriate interest rate on July 27, 2011 was 4.25 percent, and counsel for Moulding &  
3 Millwork accepted that representation. The judgment will therefore bear that interest  
4 rate.

5 IT IS THEREFORE ORDERED that Plaintiff's motion for summary judgment  
6 (Doc. 11) is GRANTED with respect to Plaintiff's second cause of action (alter ego) and  
7 DENIED in all other respects as moot.

8 IT IS FURTHER ORDERED that Defendant's cross-motion for summary  
9 judgment (Doc. 17) is DENIED with respect to Plaintiff's second cause of action (alter  
10 ego) and DENIED in all other respects as moot.

11 IT IS FURTHER ORDERED that the Clerk shall enter judgment in favor of  
12 Plaintiff and against Defendant in the amount of \$4,276,246.45, with post-judgment  
13 interest accruing at 4.25 percent per annum from July 27, 2011 until paid in full. The  
14 judgment shall also contain this sentence: "This judgment is concurrent with, and not  
15 cumulative to, the July 27, 2011 judgment entered by the Maricopa County Superior  
16 Court in civil case number 2009-037646." The Clerk shall terminate this case.

17 Dated this 10th day of April, 2012.

18  
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20 \_\_\_\_\_  
21 Neil V. Wake  
22 United States District Judge  
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